TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

OESTERLEIN MACHINE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 5, 1927
CERTIORARI GRANTED MAY 2, 1927

(32563)

Marshalls
should be claimed
1- Each year
Stands on its
own bottom
This appeal no
deficiency - 18
210 The Commr
has the right
to appeal the
assessment
Compelled
to give Sp
assessment
9.296.17

1- Taxes for 1918 were reduced by the Commissioner
1918 The there was no "deficiency" for that year. No
appeal is given unless there is difference
in favor of the Government between the return
and the assessment.

1919 Held that special assessment under S B 328
1918 was properly denied. The tax for that year
was by the Commr increased over the return by
10,240.09. i.e a "deficiency" of that amount
[The last figure includes $245 for 1920]

10240.09
4000
12240.09
182.45
5%64

The Co appealed to the B.T.A (1) It alleged
that as 1918 assessed under 328, the standard
was defective and that there should have
10240.09 been a greater reduction from the tax
9296.17 it claimed in its return (2) that the Commr
943.92 ought to have assessed as to 1919 specially
182.45 under S 328 because (a) he could not ascertain
1126.37 invested Capital for 1917. (b) Net income for 19
was abnormal (c) Profits tax was greater than

appeal is given unless there is difference in favor of the Government between the return and the assessment.

1919 Held that special assessment under S B 328 1918 was properly denied. The tax for that year was by the Commr increased over the return by 10,240.09. I.e a "deficiency" of that amount [The last figure includes $245 for 1920]

10240.09
4000
12240.09
6295
5764

The Co appealed to the B. T. A (1) It alleged that as 1918 assessed under 328, the standard was defective and that there should have been a greater reduction from the tax it claimed in its return (2) that the Commr ought to have assessed as to 1919 specially under S 328 because (a) he could not ascertain invested Capital for 1917. (b) Net income for 1919 was abnormal (c) Profit tax was greater than the ratio average of upon corporations alleged to be average -

10240.09
4296.17
943.92
182.45
1126.37

The Commr denied jurisdiction of B. T. A. to authorize deposition or require response to subpoena because (1) S 327, 328 gave him non-reviewable power to determine whether

whether relief should be granted by St
assessment + that such assessments
were final (2) The information submitted
by other tax payers had been received in confi-
dence and its disclosure was prohibited
by law. - The B T A. Sup Ct -
+ C of A all held against the
Commissioner -

"

Now [is for the first time] the Commr
Contends I that the B.T.A had no jurisdiction
under the Act of 1924 to review the tax for 1918
as there was no deficiency - i.e appeal
lies only when return is less than the
assessment - That each year must
be separately considered — II That
the Commissioner's decision that the
Company was not entitled to a
Special assessment [is respect of the invested
Capital feature] is final. —

1 Each year stands on its own
bottom:

2. It may be is for the Commr finally
to decide when Special assessment
shall be Made - But leaving that
to the B.T.A would not require mandamus -

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 210

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

OESTERLEIN MACHINE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Record from Supreme Court of District of Columbia	1	1
Caption [omitted in printing]	1	1
Petition	1	1
Exhibit "A"—Letter from J. G. Bright to Oesterlein Machine Co., June 28, 1924	9	9
Exhibit "B"—Petition, U. S. Board of Tax Appeals	11	11
Exhibit "C"—Answer	14	15
Exhibit "D"—Motion to strike application for order to take depositions	15	16
Exhibit "E"—Opinion, Korner, C	16	17
Exhibit "F"—Application for subpœna to answer interrogatories	26	28
Exhibit "G"—Subpœna to answer certain questions of fact	29	31
Exhibit "H"—Letter from D. H. Blair to Board of Tax Appeals, March 28, 1925	31	34
Exhibit "I"—Motion to proceed in court	33	35
Exhibit "J"—Order denying motion to proceed in court	34	36
Rule to show cause	35	38
Answer	36	38
Motion to dismiss	38	41
Decree and note of appeal	39	42
Assignments of error	40	43
Praecipe for transcript of record	40	43
Clerk's certificate [omitted in printing]	41	44
Proceedings in Court of Appeals of District of Columbia	42	44
Argument and submission [omitted in printing]	42	44
Opinion, Van Orsdel, J	43	44
Decree	51	49
Memorandum re motion to stay mandate	52	49
Order granting motion to stay mandate	53	49
Clerk's certificate [omitted in printing]	54	49
Order allowing certiorari	55	50

1 [Caption omitted.]

In Supreme Court of District of Columbia

Equity No. 44155

OESTERLEIN MACHINE COMPANY (A CORPORATION), PETITIONER

vs.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, AND UNITED States Board of Tax Appeals, defendants

Petition

Filed May 25, 1925

To the Honorable the Judges of the Supreme Court of the District of Columbia:

The petitioner respectfully states:

1. That the petitioner, the Oesterlein Machine Company, is a corporation incorporated under the laws of the State of Ohio, with its principal office at 3301 Colerain Avenue, Cincinnati, Ohio, and brings this petition in its own right.

2. That the defendant, David H. Blair, is a citizen of the United States, a resident of the District of Columbia and Commissioner of Internal Revenue, and is sued both in his own right and as Commissioner of Internal Revenue.

3. The defendant, United States Board of Tax Appeals, is a quasi-judicial tribunal established under the revenue act of 1924 (Pub. No. 176, 68th Cong.) and has offices in the Investment Building, 15th and K Streets, Northwest, Washington, D. C., and is made a defendant as hereinafter shown. J. Gilmer Korner, Jr., is chairman of said board, and Robert C. Tracy its secretary.

4. In 1918 the petitioner duly filed its income and excess-profits tax returns for the year 1917 under the provisions of the revenue act of 1916 (39 Stat. L. 756, chap. 10) as amended by the revenue act of 1917 (40 Stat. L. 300, chap. 12) and under the revenue act of 1917 (40 Stat. L. 300, chap. 12).

5. In 1919 and 1920, respectively, the petitioner duly filed its income and profits tax returns for the years 1918 and 1919 under the

2 provisions of the revenue act of 1918 (40 Stat. L. 1062, chap. 18), showing thereon taxes due as follows, to wit, $54,351.29 for the year 1918, and $20,453.66 for the year 1919, which said taxes were duly paid. The net income for each year reported by the petitioner in said returns was overstated by reason of petitioner's failure to claim and take certain deductions allowed by law, a part of which said deductions were later allowed the petitioner by the Commissioner of Internal Revenue.

6. The excess-profits tax imposed by Title II of the revenue act of 1917 is computed by reference to the relation between net income and invested capital determined as therein provided. Section 210 of said Title II provides in effect that in case the Secretary of the Treasury is unable satisfactorily to determine the invested capital of a corporation the excess-profits tax in such case shall be computed by reference to the average ratio of net income to invested capital of a group of representative corporations engaged in a like or similar trade or business.

7. The war-profits and excess-profits tax imposed by Title III of the revenue act of 1918 is likewise computed by reference to the relation between net income and invested capital determined as therein provided; and sections 327 and 328 of said Title III provide that where the Commissioner of Internal Revenue is unable satisfactorily to determine the invested capital of a corporation, in such case the tax shall be the same percentage of net income as the average percentage of tax to net income of a group of representative corporations engaged in a like or similar trade or business and similarly circumstanced with respect to certain factors therein specified.

8. On April 17, 1920, the then Deputy Commissioner of Internal Revenue, G. V. Newton, addressed to the petitioner a letter in regard to petitioner's 1917 returns, stating:

"That owing to defective accounting, your statutory capital cannot be satisfactorily determined. Your case has been given consideration under the provisions of section 210 of the revenue act of October 3, 1917, and articles 18, 24, and 52 of Regulations 41, which provide that an excess-profits tax may be based upon a comparison with a group of concerns engaged in a like or similar line of business, which in their general character are comparable, as to the essential component parts influencing the tax liability to your company."

9. After receiving the deputy commissioner's letter of April 17, 1920, referred to in paragraph 8 above, your petitioner, believing that the Commissioner of Internal Revenue would experience the same inability to determine petitioner's invested capital for the years 1918 and 1919 that the commissioner had experienced in determining invested capital for 1917, filed in 1921 amended returns for the years 1918 and 1919, showing thereon the same amount of taxable net income as previously shown on the original returns, but showing no invested capital on such amended returns, and no computation of tax. Attached to each of the amended returns for 1918 and 1919 was a rider reading as follows:

"This amended return is filed in accordance with T. D. 3220 of August 26, 1921, and in that connection your attention is called to attached copy of our letter of October 5, 1918, and abstract of your letter from April 17, 1920, IT–C–SM–WFF–20751, 648.

3 "As the tax for 1917 has been assessed by the department and paid under the provisions of section 210 of the revenue act of 1917, similar relief for 1918 and subsequent years is requested under sections 327 and 328 of the act of 1918, and all details as to

invested capital and resulting tax have been accordingly omitted on our amended returns now filed in compliance with T. D. 3220."

10. Thereafter, one C. F. Mayer, a United States internal revenue agent, in performance of his official duty, made a field examination of petitioner's books and records for the purpose of checking petitioner's liability for 1918, 1919, and 1920 taxes, and made an official report under date of February 15, 1923, addressed to Internal Revenue Agent in Charge, Cincinnati, Ohio, reading in part as follows:

"The statutory invested capital can not be satisfactorily determined for reasons as detailed in this report under heading 'Comments in reference to claim for refund, year 1917.'

"In determining the tax liability for the year 1917, owing to defective accounting, taxpayer has been given consideration under the provisions of section 210 of the revenue act of October 3, 1917, and reference is made to A–2 letter April 17, 1920.

"The defective accounting was remedied in years subsequent to 1917, however, adjustments made by Ernst and Ernst, as at December 31, 1917, are reflected in financial statements of succeeding years.

"The assumption is that the same status as to statutory capital as in prior years is in evidence for the years 1918 to 1920 now under review, and the taxpayer requests consideration under sections 327 and 328 of the revenue act of 1918 and has already made application to the department to this effect.

"In conclusion, as a precedent has been established by the department for the year 1917 in the application of section 210, revenue act of 1917, the assumption is the taxpayer will receive consideration under sections 327 and 328 of the revenue act of 1918 for the years 1918 to 1920 under review.

"As invested capital is not satisfactorily determinable, and in view of the taxpayer's request submitted to the department, this report does not embody computations to establish the tax liability with invested capital as a factor."

11. On April 12, 1923, the office of the Commissioner of Internal Revenue addressed to petitioner a letter setting forth a revised computation of tax liability for the years 1918, 1919, and 1920, showing total taxes as follows:

Year 1918	$68,335.92
" 1919	26,998.84
" 1920	371.66

12. The aforesaid revised computation of tax for 1918 and 1919 was made in part under section 301 of the revenue act of 1918 by using an invested capital assumed to have been determined under section 326 of the act, and without reference to sections 327 and 328 of the act, and without reference to petitioner's amended returns and the petitioner's application for assessment under sections 327 and 328. The profits tax, exclusive of normal tax, for 1918, computed as aforesaid, amounted to $43.85 per cent of the net income.

4 13. On April 13, 1923, petitioner filed an appeal with the Commissioner of Internal Revenue protesting against certain income adjustments for the years 1918, 1919, and 1920.

14. On May 5, 1923, petitioner addressed a letter to the Commissioner of Internal Revenue, again requesting that its tax liability be determined under sections 327 and 328 of the revenue act of 1918.

15. On August 6, 1923, the office of the Commissioner of Internal Revenue, after making certain reductions in the net income for each year shown in aforesaid (paragraph 11 above) letter of April 12, 1923, issued a revised tax letter setting forth a revised computation of petitioner's tax for 1918, 1919, and 1920, showing total taxes as follows:

Year 1918	$51,722.11
" 1919	30,693.75
" 1920	102.45

16. In the aforesaid letter of August 6, 1923, the profits tax, exclusive of normal tax, for 1918 was determined under section 328 of the revenue act of 1918 to be 52.79 per cent of net income; the profits tax for 1919 was computed under section 301 of the act, upon the basis of invested capital assumed to have been determined under section 326, and without reference to sections 327 and 328.

17. On March 13, 1924, petitioner filed a protest with the Commissioner of Internal Revenue against the determination of tax set forth in the aforesaid letter of August 6, 1923, which said protest was referred by the commissioner to his appellate agency, known as the Committee on Appeals and Review, now abolished.

18. After hearing, the said committee rendered a decision, recommendation No. 7402, April 1, 1924, which was approved by David H. Blair, Commissioner of Internal Revenue, in which recommendation the committee said, in part:

"* * * The net income for each year is abnormal in other respects, details of which are of no particular importance in this record. The committee, after careful consideration, is of the opinion that the profits tax for the year 1918 in the amount of 44.23 per cent of corrected net income is equitable to the Government and the taxpayer.

"With respect to the year 1919 the committee has investigated the statistics of concerns which were suggested at the oral hearing and the statistics of additional concerns, and is of the opinion that assessment of the profits tax for the year 1919, under the provisions of section 328 of the 1918 revenue act was properly denied."

19. Thereafter the office of the Commissioner of Internal Revenue issued a tax letter dated June 28, 1924, copy of which is attached hereto as Exhibit A which was mailed to petitioner on June 28, 1924, by registered mail, setting forth a tax for 1918 of $45,055.12, and stating: "The tax liability for 1919 and 1920 as shown in office letter of August 6, 1923, is hereby affirmed."

20. The profits tax, exclusive of normal tax, for 1918 shown in aforesaid letter of June 28, 1924, was determined under section 328 of the revenue act of 1918 to be 44.23 per cent of net income, with the following explanation, as contained in said letter:

5 "The rate established under section 328 by the committee had been applied to the income for 1918 as shown in office letter dated August 6, 1923. * * *"

21. Within sixty days from the date of mailing aforesaid letter, to wit, on August 22, 1924, petitioner filed a petition with the defendant Board of Tax Appeals, appealing from the determination of the defendant Commissioner of Internal Revenue, as set forth in aforesaid letter of June 28, 1924, on the grounds, among others, (1) that the commisisoner erred in determining the percentage of profits tax for the year 1918 under section 328 of the revenue act of 1918, and (2) that the commisisoner erred in refusing to determine the profits tax for 1919 under said section 328. Copy of said petition is attached hereto as Exhibit B.

22. On September 12, 1924, the defendant, David H. Blair, Commissioner of Internal Revenue, by his attorney, Nelson T. Hartson, Solicitor of Internal Revenue, filed with the defendant Board of Tax Appeals an answer to the aforesaid petition. Copy of said answer is attached hereto as Exhibit C.

23. On October 2, 1924, hearing was had before the Board of Tax Appeals on the aforesaid appeal. By order of the Board of Tax Appeals the said appeal was continued and placed on the reserve calendar for the taking of proofs, and to permit petitioner to engage counsel for the further prosecution of the appeal.

24. Thereafter, on Oct. 13, 1924, counsel for petitioner filed with the defendant, the Board of Tax Appeals, application for an order to take the deposition of one John F. Barnes of Rockford, Illinois, who was expected to give certain testimony relating to the Federal income and profits taxes of W. F. and John Barnes Company, a corporation of Rockford, Illinois, for the years 1918 and 1919.

25. The defendant, Commissioner of Internal Revenue, by his attorney, Nelson T. Hartson, Solicitor of Internal Revenue, thereupon filed with the defendant, the Board of Tax Appeals, a motion to strike aforesaid application on the ground, among others, that (1) the United States Board of Tax Appeals had no jurisdiction to review the action of the Commisisoner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921. Copy of the aforesaid motion is attached hereto as Exhibit D.

26. On November 1, 1924, hearing was had on the aforesaid motion of the commissioner, and on December 11, 1924, the Board of Tax Appeals rendered a decision denying the motion to strike by the Commissioner of Internal Revenue with an opinion published in the official reports of the Board of Tax Appeals, vol. 1, No. 3, at page 159, copy of which is attached hereto as Exhibit E.

27. On March 17, 1925, counsel for petitioner filed with the Board of Tax Appeals an application of a subpœna directed to the defendant, David H. Blair, Commissioner of Internal Revenue, requiring him to answer in writing under oath certain questions of fact, relating

to the taxes of certain other taxpayers who were engaged in a trade or business like or similar to that of petitioner in the years 1918 and 1919. Copy of said application is attached hereto as Exhibit F.

6 28. After hearing on the aforesaid application, the Board of Tax Appeals issued said subpœna as prayed for directed to the defendant, David H. Blair, Commisisoner of Internal Revenue, under the provisions of section 900 (i) of the revenue act of 1924, requiring him to answer in writing under oath certain questions of fact specified in schedule thereto annexed relating to the 1918 and 1919 Federal war-profits and excess-profits taxes of twelve specified corporations, and of certain other corporations used as comparatives by the commissioner in his determination of petitioner's tax liability for 1918 and 1919. Copy of the subpœna is attched hereto as Exhibit G.

29. The defendant, David H. Blair, Commissioner of Internal Revenue, failed and refused to obey aforesaid subpœna, but addressed a communication to the Board of Tax Appeals under date of March 28, 1925, stating his opinion that the duties of his office would not admit the furnishing of the information called for in said subpœna, and stating as his reasons (1) that the information called for in interrogatories annexed to said subpœna was communicated to him as Commissioner of Internal Revenue in strict confidence and is privileged, and (2) that answer to said interrogatories will divulge information and data from the records in his office, publication of which is prohibited by the provisions of section 3167 of the Revised Statutes, all of which will more fully appear from a copy of said communication attached hereto as Exhibit H.

29½. The aforesaid failure and refusal of the defendant, David H. Blair, Commissioner of Internal Revenue, is arbitrary, wrongful, and illegal, and the reasons advanced by him as aforesaid for such failure and refusal are insufficient and invalid, and such failure and refusal is inconsistent with the act of said defendant in introducing in evidence and making public in appeals pending before the United States Board of Tax Appeals the income-tax returns of third persons not parties to such appeals, which he, the said defendant, Commissioner Blair, by his attorney, did on February 17, 1925, at Huntington, West Virginia, on February 18, 1925, at Bluefield, West Virginia, on February 19, 1925, at Roanoke, Virginia, and on February 20, 1925, at Lynchburg, Virginia, introducing in evidence, in the appeal of the Citizens Underwriters Agency then being heard before a member of said board, the income-tax returns of several, to wit: Eleven other persons not parties to said appeal, as will appear on pages 21, 22, 115, 116, 243, 244, 260, 270, 271, 287, 288, 308, 309, 332, 333, 361, 362, 562, 563, and 573, stenographer's minutes of the proceedings in Appeal of Citizens Underwriters Agency, United States Board of Tax Appeals Docket No. 100; and again on March 2, 1925, introducing in evidence in the appeal of Denholm & McKay Company then being heard before said board in Washington, D. C., the

income-tax returns of another taxpayer not a party to the appeal, as will appear on page 74, stenographer's minutes of the proceedings in appeal of Denholm & McKay Company, United States Board of Tax Appeals Docket No. 643.

30. Petitioner is advised that it was and is the duty of the defendant, the Board of Tax Appeals, and under the law it was encumbent upon said board to enable it to fully perform the function for
7 which it was created, to procure the information sought by aforesaid subpœna of the board from the defendant, Commissioner Blair. Accordingly, on April 13, 1925, the petitioner filed with the Board of Tax Appeals a motion entitled "Motion to proceed in court," moving the Board of Tax Appeals to apply to the Supreme Court of the District of Columbia under provisions of section 1025 (a), revenue act, 1924, for appropriate process to compel the defendant, Commissioner Blair, to obey the subpœna of the board and to make answer in writing under oath to the aforesaid question of fact. Copy of the motion to proceed in court is attached hereto as Exhibit I.

31. On April 27, 1925, the Board of Tax Appeals issued an order denying petitioner's motion to proceed in court, stating that such action by the board was unnecessary because, in their opinion, the purpose of section 1025 (a) was to afford relief primarily to the party at whose instance the subpœna is issued and that such party would be the logical party plaintiff to apply to the court for appropriate process to secure its rights under the law, all of which will more fully appear from a copy of the opinion and order of said board attached hereto as Exhibit J.

32. The tax determined by the defendant commissioner for the year 1918 as set forth in the aforesaid letters (paragraphs 15 and 19 above) of August 6, 1923, and June 28, 1924, was computed in part on the basis of facts which have not been disclosed to the Board of Tax Appeals or to the petitioner, but the defendant commissioner, his agencies and representatives, have hitherto kept secret and undisclosed and have refused, and still refuse, to reveal to the petitioner or to the Board of Tax Appeals the facts upon which said tax was computed. The defendant, Commissioner Blair, his agencies and representatives, have likewise kept secret and refused to reveal either to petitioner or said board the facts upon which said commissioner determined that petitioner's tax for the year 1919 should not be computed under section 328, revenue act of 1918.

33. Petitioner was, in the years 1918 and 1919, engaged in the business of manufacturing and selling machine tools.

34. Petitioner, after inquiry by letter and in person through its president, Charles D. Oesterlein, is informed, and, so believing, avers that said corporations were engaged in a trade or business like or similar to that of petitioner, that said corporations filed Federal income and profits tax returns for the years 1918 and 1919, and were representative taxpayers in those years, and that the said corpora-

tions are comparable as nearly as may be required by section 328 of the revenue act of 1918.

35. All the facts sought to be proved by means of answers required by the aforesaid subpœna are within the official knowledge of the defendant Commissioner Blair and are not within the knowledge of any other person whomsoever outside the commissioner's office, and the data required by said subpœna are in the records and files of said commissioner's office.

36. The answers required by aforesaid subpœna are relevant, material, and necessary to enable the defendant, the Board of Tax Appeals, to hear and determine petitioner's appeal now pending before the board.

37. The evidence sought to be adduced by aforesaid subpœna of the Board of Tax Appeals and schedule thereto annexed is the
8 primary and best evidence on the subject of this petitioner's liability for tax computed under provisions of section 328, revenue act of 1918.

38. The defendant, the United States Board of Tax Appeals, having been requested by petitioner as aforesaid, to apply to the Supreme Court of the District of Columbia, under the provisions of section 1025 (a) of the revenue act of 1924, for appropriate process to compel obedience of said Commissioner Blair, to its subpœna, and having declined so to do for the reasons hereinbefore set forth, for that reason is made a defendant herein.

Wherefore, being without remedy except by assistance of this court, your petitioner prays:

I

That said David H. Blair, Commissioner of Internal Revenue, and the United States Board of Tax Appeals be made defendants hereto, and that the writ of subpœna may issue to them commanding them and each of them to appear and make answer to the exigencies of this petition;

II

That a rule issue out of this court to be served upon the defendants and each of them and requiring them to show cause, if any they have, herein on a day named why the prayers of this petition for relief should not be granted, and why the defendant Commissioner of Internal Revenue should not be required to forthwith obey the subpœna issued by the defendant United States Board of Tax Appeals, and to answer under oath the questions submitted by said board along with said subpœna calling for information necessary and proper to enable said board to pass upon and determine the rights of this petitioner in the premises;

III

And that a decree be passed in this cause requiring the defendant Commissioner Blair to produce before the United States Board of

Tax Appeals the data in manner and form as specified and required by the aforesaid subpœna of the board and schedule thereto annexed which he has hitherto declined to do as aforesaid, and to produce before said board any and all other relevant and necessary data relating to the aforesaid appeal now pending before the Board of Tax Appeals which said board may require him to produce;

IV

And for such other and further relief as the nature of the case may require and to the court may seem equitable and proper.

OESTERLEIN MACHINE COMPANY, INC.,
By EDWARD MCCARTHY, JR., *Attorney.*

HAMILTON & HAMILTON,
MILLER & CHEVALIER,
Attorneys for Petitioner.

9 [*Duly sworn to by Edward McCarthy, jr. Jurat omitted in printing.*]

Exhibit A to petition

Officer of Commissioner of Internal Revenue

TREASURY DEPARTMENT,
Washington, June 28, 1924.

OESTERLEIN MACHINE COMPANY,
3301 Colerain Avenue, Cincinnati, Ohio.

SIRS: Reference is made to your income and profits-tax returns for 1918, 1919, and 1920 and to the committee on appeals and review recommendation #7402 under date of April 1, 1924.

After a careful checking of the items involved for these three years it has been disclosed that the amount of cost on which amortization was allowed for 1917 was $23,922.45, which was increased by $78,620.65, making a total cost of $102,543.10 to be amortized for 1918. This item, $78,620.65, is made up as follows:

Buildings	$20,201.02
Machinery	27,647.02
Power-plant machinery	852.63
Factory equipment	24,845.87
Office equipment	5,074.21
Total	$78,620.75

It will be noted that the amount, $24,845.87, has been taken as cost upon which amortization was allowed. This item therefore was properly excluded from the cost upon which depreciation was computed for 1918, since under the regulations a deduction for amortization and depreciation can not be allowed upon the same asset, but that any allowance for the former is inclusive of the latter.

Examination of the 1919 and 1920 returns discloses the same condition for those years.

These items of additional depreciation claimed therefore are based upon a cost which was used as a basis for amortization, and since the amortization was allowed the depreciation can not be, and the income for these three years, as shown in office letter dated August 6, 1923, is correct and is hereby sustained.

10 The item of $7,707.34 questioned in paragraph 2, page 2, of your brief of April 30, 1923, is arrived at as follows:

Total depreciation originally allowed for 1918	$24,536.21
10% on factory equipment erroneously omitted	1,258.63
Total	$25,794.84
Total (brought forward)	$25,794.84
Plus 25% additional per committee recommendation #3154	6,448.71
Total	$32,243.55
25% additional allowed	$6,488.71
10% previously omitted	1,258.63
Total as above mentioned	$7,707.34

The rate established under section 328 by the committee has been applied to the income for 1918, as shown in office letter dated August 6, 1923, with the following result:

Net income			$88,896.99
Profits tax			39,349.41
Net income		$88,896.99	
Less:			
Profits tax	$39,349.41		
Exemption	2,000.00		
		41,349.41	
Balance taxable at 12%		47,547.58	5,705.71
Total tax assessable			$45,055.12
Tax previously assessed			$54,351.29
Tax assessable			45,055.12
Overassessment indicated			$9,296.17

The tax liability for 1919 and 1920, as shown in office letter of August 6, 1923, is hereby affirmed.

In accordance with the provisions of section 274 of the revenue act of 1924 you are allowed sixty days from the date of this letter in which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

When a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the sixty days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement is respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of

IT:E:SM–RLC–A–5870. In the event that you acquiesce in part of the determination, the agreement should be executed with respect to the items agreed to.

The right of appeal to the Board of Tax Appeals as indicated above refers only to any deficiency in tax as indicated herein, inasmuch as there is no provision in the revenue act of 1924 granting the right of appeal against the determination of any overassessment found upon an audit of your returns.

Respectfully,

(Signed) J. G. BRIGHT,
Deputy Commissioner.

Enclosure: Agreement.

United States Board of Tax Appeals

Appeal of the Oesterlein Machine Company, Cincinnati, Ohio

PETITION

Subject: Income and profits tax 1918, 1919, 1920.
Reference: IT–SA–SM, DAH–A–5870,
B–1389, C–641.
Submitted August 19, 1924.

Exhibit B to petition

The Oesterlein Machine Co.

Sheet 1.

CINCINNATI, OHIO, *August 19, 1924.*

United States Board of Tax Appeals

Appeal of The Oesterlein Machine Company, Cincinnati, Ohio

PETITION

Subject: Income and profits tax, 1918–1919–1920.
Reference: IT–SA–SM, DAH–A–5870,
B–1389, C–641.

GENTLEMEN: Referring to the letter of Commissioner of Internal Revenue dated June 28, 1924, and to the Committee on Appeals and Review Recommendation #7402 under date of April 1, 1924, in accordance with the provisions of section 274 of the revenue act of 1924, we herewith file an appeal contesting the correctness of the determinations set forth for the following reasons:

1. There is a mathematical error in the computation of profits tax due for 1918.

The committee's recommendation, page 3, first paragraph, last sentence, reads:

"The committee after a very careful consideration, is of the opinion that a profits tax for the year 1918 in the amount of 44.23 per cent of corrected net income is equitable to both the Government and the taxpayer."

Applying this rate to the net income, quoted as $88,896.99, the profits tax would be $39,319.14, and not $31,349.41.

2. An impossible conclusion is cited as a reason for disallowing certain depreciation for 1919 and 1920.

The commis'ioner's letter, in the last paragraph of the first page, referring to the years 1918, 1919, and 1920, reads:

"These items of additional depreciation claimed therefore
12 are based upon a cost which was used as a basis for amortization, and since the amortization was allowed the depreciation cannot be, etc., etc."

No amortization was allowable by the Government on purchases made in either 1919 or 1920, and therefore this decision is in error. The additional depreciation claimed for these years should be allowed in accordance with the committee's recommendation.

3. The determination is not in accordance with the committee's recommendation.

The recommendation, page 2, last paragraph, reads:

"The committee recommends accordingly that total depreciation for the years 1918, 1919, and 1920 be allowed in the following respective amounts, $33,796.42, $36,633.62, and $46,815.42, all computations subject to any check which the unit in its discretion may wish to make."

On the false grounds referred to in No. 2 above, the unit has wrongfully disallowed the additional depreciation which the committee in their recommendation concedes.

4. The committee's recommendation does not give us the relief by special assessment to which we are entitled according to the computation of the income tax unit.

Referring to page 3, the first paragraph read as follows:

"With reference to the application of the taxpayer for the determination and assessment of the profits taxes for the years 1918 and 1919, under the provisions of section 328 of the 1918 revenue act, the unit has concluded that this is an exceptional case within the scope of said section of the 1918 act. In this connection, while the committee finds that the legal effect of certain arrangements which the taxpayer entered into for the acquisition of the Tatum property was not that of a purchase, evidence has been introduced by the taxpayer to show that it was the intention to purchase such property. The unit at one time in the course of the audit computed what would have been an allowable amortization deduction had the taxpayer been the legal owner of the property, and made a finding as to amortization in the sum of approximately $46,000.00 The net income for each

year is abnormal in other respects, details of which are of no particular importance in this record. The committee, after very careful consideration, is of the opinion that a profits tax for the year 1918 in the amount of 44.23 per cent of the corrected net income is equitable to both the Government and the taxpayer."

In the statement accompanying the commissioner's letter of August 6, 1923, our profits-tax assessment for 1918 is 52.79 per cent of corrected net income, or $46,925.53. By reducing this profits tax to 44.23 per cent the amount of tax becomes $39,319.14, thus affording actual relief of only $7,606.39.

According to the computation of the Income Tax Unit to which the committee refers (report on reexamination of amortization claim of the Oesterlein Machine Company, Cincinnati, Ohio, under date of December 14, 1922) the allowable amortization deduction of $46,200.00 based upon a profits tax of 52.79 per cent would have afforded relief of $24,393.60.

The committee, in the paragraph under discussion, admits that we are entitled to relief, and we claim, this being true, that the
13 amount computed by the unit, namely, 52.79 per cent of $46,200.00 or $24,393.60, is correct and should be allowed. We are not now operating and have never since this computation was made operated as much as 25 per cent of capacity, upon which this allowance was based.

In this regard we command your attention to the summary of profits and loss for the years 1917 to and including 1923, appearing in our appeal dated March 13, 1924, reflecting a net loss for the entire period of $23,554.33. These figures also show conclusively that all actual profit earned was paid to the Government in taxes and that the book profit standing to the credit of surplus account upon which taxes was paid has since vanished. This in itself argues that the amount of tax reduction resulting from the unit's computation is not excessive.

5. The committee is in error in denying assessment of the profits tax for the year 1919 under the provisions of section 328 of the 1918 revenue act.

Concerns suggested at the oral hearing to which reference is made in the committee's recommendation, page 3, second paragraph, are as follows:

The American Tool Works Co	Cincinnati, Ohio
Bullard Machine Tool Company	Bridgeport, Conn.
Fellows Gear Shaper Company	Springfield, Vt.
Giddings & Lewis Machine Tool Co	Fond du Lac, Wis.
Gardiner Machine Co	Beloit, Wisconsin.
Hofer Manufacturing Co	Freeport, Illinois.
Kempsmith Manufacturing Co	Milwaukee, Wis.
Landis Tool Company	Waynesboro, Pa.
Taylor & Fenn Company	Hartford, Conn.

The average ratio of profits tax to income of this group of corporations, including our own, is 15.8%, where as ours alone is 20.7%.

The justification for our request for assessment of the profits tax for the year 1919 under the provisions of section 328 of the 1918 revenue act will be found in the department's letter to us under date of April 17, 1920, from which we quote:

"You are advised that owing to defective accounting, your statutory capital can not be satisfactorily determined. Your case has been given consideration under the provisions of section 210 of the revenue act of October 3, 1917, and articles 18, 24, and 52 of Regulations 41."

Under section 328 of the 1918 revenue act our profits tax for 1919 should not exceed 15.8% of corrected net income for 1919.

6. There is an error of omission in the committee's recommendation to the unit.

In our appeal of March 13, 1924, page 2, last paragraph, we say:

"The committee on Appeals and Review in disposing of our appeal of April 23, 1923, by their letter of May 21, 1923, addressed to Mr. W. B. Dickerson, page 2, last paragraph says":

"'After careful consideration the committee has reached the conclusion that neither method proposed by the unit is proper. The down payment of $10,000.00 should be regarded as advance rental, and where a taxpayer's books are kept on the accrual basis of accounting he may, at his option spread such advance rental over the term of the lease and report an aliquot part thereof each
14 year as earned. So much, therefore, of the amount received as advanced rental as was properly earned in the year 1918 should be returned as income for that year, and in view of the termination of the lease in 1919, the balance should be returned as income for the year 1919. Under this theory the sale in 1919 should be treated as an installment sale and the profit arising therefrom should be allocated rotably to 1919 and subsequent years on an installment sales basis.'

"The Income Tax Unit has not treated the sale referred to nor the profit arising therefrom in accordance with this decision."

This refers to an error in the statement accompanying the commissioner's letter of August 6, 1923. In our letter of March 3, 1923, addressed to the commissioner, in which we reported full details of the transaction involved, the last page, first paragraph, reads:

"The purchase price of the property was $35,000.00, upon which we paid a commission of 3%, or $1,050.00, and the first payment of $10,000.00 was made in accordance with the terms of the lease, as were also the following payments to and including 1920."

The commission is surely a proper deduction from the $10,000.00 leaving $8,950.00 as income to be distributed over the five years and not $10,000.00 as reflected in the computation to which we take exception. According to our computation, the "income from leasehold Grove Avenue property" in 1918 should be $1,240.71 instead

of $1,386.30. The "additional income from sale of property" in 1919 should be $9,415.96 instead of $10,320.37. No recommendation has been made by the committee in regards to these errors. Furthermore, no recommendation has been made regarding redetermining profits tax due for 1917.

This appeal is not filed for the purpose of delaying the payment of additional tax.

It is requested that the undersigned officer of this corporation be granted an oral hearing before the board on this appeal.

THE OESTERLEIN MACHINE COMPANY,

By ——— ———, *Vice President.*

Sworn to before me and subscribed in my presence this 19th day of August, 1924.

[Copy]

Exhibit C to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Co., Cincinnati, Ohio. Docket No. 46

ANSWER

The Commissioner of Internal Revenue by his attorney, Nelson T. Hartson, solicitor of internal revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) Admits that the taxpayer is a corporation, and has its place of the business at Cincinnati, Ohio.

15 (2) Admits that deficiency letter dated June 28, 1924, proposing an additional assessment as computed in office letter of August 6, 1924, proposing the assessment of additional tax of $10,240.09 for the year 1919, and $182.45 for the year 1920, was mailed to the taxpayer.

(3) Denies that error was committed in computing the profits tax due from the taxpayer for the year 1918.

(4) Denies that error was committed in disallowing certain depreciations for the years 1919 and 1920 as claimed in the petition.

(5) Denies that the determination of the taxpayer's liability was not in accordance with the recommendation of the Committee on Appeals and Review.

(6) Denies that error was committed in denying to the taxpayer special assessment for the year 1919, under the provisions of section 328 of the revenue act of 1918.

(7) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

PROPOSITION OF LAW

(1) Such parts of the petition that seek a review by the Board of Tax Appeals of the overassessment for the year 1918, should be expunged.

Wherefore it is prayed that the taxpayer's appeal be denied.

NELSON T. HARTSON,
Solicitor of Internal Revenue,
Attorney for the Commissioner of Internal Revenue.

Exhibit D to petition

United States Board of Tax Appeals

In re: Oesterlein Machine Company, Cincinnati, Ohio. Docket No. 46

MOTION

Now comes the Commissioner of Internal Revenue, by his attorney Nelson T. Hartson, Solicitor of Internal Revenue, and moves to strike the application for order to take depositions filed by the taxpayer herein and for grounds of the motion says:

(1) The evidence of the witness, whose deposition it is proposed to take, is not and can not be made admissible, relevant, or competent for the purpose of proving the fact in issue, if, in fact, the board has jurisdiction to entertain an appeal and review the action of the commissioner in fixing a rate in compliance with the law in special assessment cases.

(2) The United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921 16 and, therefore, the testimony of the witness, if taken, could serve no purpose.

(3) By section 328 of the revenue acts of 1918 and 1921 Congress has delegated to the Commissioner of Internal Revenue, subject to the restrictions and limitations contained in said section of the respective acts, authority to fix rates in making special assessments, and his action in the exercise of such authority can be reviewed or recalled only by the legislative body which gave such authority in the first instance.

(4) In granting the authority to the Commissioner of Internal Revenue to fix rates for taxing income in special assessment cases as provided in section 328 (a) (b) Congress in subjection (c) requires the commissioner to keep a record of all such cases which records Congress has retained the right to review; and this board can not draw unto itself such legislative functions, which is retained by Con-

gress to review the action of the commissioner in special assessment cases.

(5) The rule of evidence as prescribed by Congress in section 328 for determining facts upon which the rates for special assessment are to be fixed does not embrace the testimony of witnesses.

Wherefore, it is prayed that said application be denied.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Exhibit E to petition

United States Board of Tax Appeals

No. 69

Appeal of Oesterlein Machine Company. Docket No. 45

The Board of Tax Appeals has jurisdiction to hear and determine appeals from determinations of deficiencies arising under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921.

Submitted November 10, 1924; decided December 11, 1924.

Robert N. Miller, Esq., and J. R. Sherrod, Esq., for the taxpayer.

Robert A. Littleton, Esq. (Nelson T. Hartson, Solicitor of Internal Revenue), for the commissioner.

James Walton, Esq., amicus curiae.

Before HAMEL, GRAUPNER, IVINS, KORNER, MARQUETTE, SMITH, STERNHAGEN, TRAMMELL, and TRUSSELL.

This appeal came on for hearing on a motion filed by the Solicitor of Internal Revenue on behalf of the commissioner to strike the taxpayer's application for an order to take a deposition. The taxpayer's application is filed in accordance with the provisions of Rule 41 of the Rules of Practice of this board and is for an order to take the deposition of a certain designated witness whom the taxpayer proposes to examine as to facts bearing on the percentage of net income paid as profits tax by a corporation of which he is secretary and treasurer. The taxpayer proposes to offer such deposition as
17 pertinent and material evidence touching a deficiency in tax determined by the Commissioner of Internal Revenue under the provisions of sections 327 and 328 of the revenue act of 1918, and proposed by the commissioner to be assessed against the taxpayer for the years 1918, 1919, and 1920.

To the application of the taxpayer the commissioner filed the following motion:

"Now comes the Commissioner of Internal Revenue by his attorney, Nelson T. Hartson, Solicitor of Internal Revenue, and moves

to strike the application for order to take depositions filed by the taxpayer herein, and for grounds of his motion says:

"(1) The evidence of the witness whose deposition it is proposed to take is not and can not be made admissible, relevant, or competent for the purpose of proving the fact in issue, if, in fact, the board has jurisdiction to entertain an appeal and review the action of the commissioner in fixing a rate in compliance with the law in special assessment cases.

"(2) The United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921, and, therefore, the testimony of the witness, if taken, could serve no purpose.

"(3) By section 328 of the revenue acts of 1918 and 1921 Congress has delegated to the Commissioner of Internal Revenue, subject to the restrictions and limitations contained in said section of the respective acts, authority to fix rates in making special assessments, and his action in the exercise of such authority can be reviewed or recalled only by the legislative body which give such authority in the first instance.

"(4) In granting the authority to the Commissioner of Internal Revenue to fix rates for taxing income in special assessment cases as provided in section 328 (a) (b), Congress in subsection (c) requires the commissioner to keep a record of all such cases, which records Congress has retained the right to review; and this board can not draw unto itself such legislative functions, which is retained by Congress, to review the action of the commissioner in special assessment cases.

"(5) The rule of evidence as prescribed by Congress in section 328 for determining facts upon which rates for special assessments are to be fixed does not embrace the testimony of witnesses.

"Wherefore it is prayed that said application be denied."

The motion came on for hearing on November 1, 1924, and was argued by counsel for both parties as well as by amicus curiæ.

OPINION

KORNER: The motion filed by the solicitor on behalf of the commissioner is, in effect, a plea to the jurisdiction of this board to hear and determine appeals filed by taxpayers from deficiencies in tax proposed to be assessed by the commissioner (1) in cases wherein the deficiency has been determined by the commissioner under the provisions of sections 327 and 328 of the revenue act of 1918, or under sections 327 and 328 of the revenue act of 1921, com-
18 monly referred to as "special assessment" provisions, but in which cases the taxpayer contends that the tax should be com-

puted without reference to such provisions; (2) in cases wherein the deficiency has been determined by the commissioner without reference to the special assessment provisions, but in which cases the taxpayer contends that the tax should be computed under such provisions; and (3) in cases wherein the deficiency has been determined by the commissioner under the special assessment provisions, but in which cases the taxpayer contends that such determination is in error, due to an incorrect computation of the tax under such special assessment provisions.

The motion to dismiss filed herein is based on two general propositions: (1) That a determination to assess the tax under the provisions of the special assessment sections, a refusal so to determine the tax, and the computation of the tax under those provisions when they are determined to be applicable involve an exercise of discretion vested in the commissioner by law, and that his decision and computations thereunder are not reviewable, and (2) that a review of the commissioner's computation of the tax under the special assessment sections would necessitate making public in the hearing of the appeal certain records of the commissioner in violation of the so-called " secrecy provisions " of the Revised Statutes.

The revenue act of 1924 created the Board of Tax Appeals, and whatever of jurisdiction appertains to the board is to be found in its provisions. Section 900(e) provides, in part:

"The board and its divisions shall hear and determine appeals under sections 274, 279, 308, and 312."

Section 280 of the same act provides that taxes under prior acts shall be computed under those acts, but " the amounts so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations * * * as in the case of the taxes imposed by this title * * *."

The taxes involved in this appeal are income and profits taxes for the years 1918, 1919, and 1920. Section 280 of the revenue act of 1924 is contained in Title II of that act, which title relates to income tax. In order, then, to determine the manner in which assessments of income tax for 1918, 1919, and 1920 are to be made, reference is had to Title II of the revenue act of 1924.

Section 274, which is a part of Title II of the revenue act of 1924, provides:

"SEC. 274. (a) If, in the case of any taxpayer, the commissioner determines that there is a *deficiency* in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

"(b) If the board determines that there is a *deficiency*, the amount so determined shall be assessed and shall be paid on notice and de-

mand from the collector. No part of the *amount determined as a deficiency* by the commissioner but disallowed *as such* by the board shall be assessed, * * *." (Italics ours.)

19 Section 273, which is a part of the same title and act, provides:

"SEC. 273. As used in this title the term 'deficiency' means—

"(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax."

Speaking more generally, the deficiency may be said to be the difference between the amount of tax imposed and the amount previously returned and/or paid by the taxpayer. It should be noted that section 273 makes no exception as to any deficiency. No distinction is made between a deficiency arising under one section of the title and that arising under any other section of the title. The manner in which "deficiency" is used in section 274, taken with its definition in section 273, constitutes that term all-embracing under that title. It includes any amount determined as a deficiency by the commissioner. The manner of the assessment and collection of all such deficiencies is controlled by the provisions of Title II of the revenue act of 1924 and is applicable to each and every section of that title not specifically excepted. That this is true is evidenced by the fact that Congress deemed it necessary, in a case intended to be excepted, to make express provision therefor. Such exception appears in section 278 of the revenue act of 1924, which provides, in part, as follows:

"SEC. 278. * * * (b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the revenue act of 1918 or the revenue act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

The above section provides an exception to the otherwise inclusive manner of assessment and collection of deficiencies generally under Title II. The statute provides no exception as to the manner of assessment and collection of deficiencies arising under the special assessment sections.

It must follow, then, that Congress intended that an appeal should lie to the board from a deficiency arising from a determination involving the special assessment provisions above referred to, unless the statute elsewhere makes it clear that the commissioner alone is vested with conclusive determinative authority by reason of discretionary powers granted to him, or unless it is made equally clear that the revenue act of 1924 has not modified the so-called "secrecy pro-

visions" in such manner as to give the board authority effectively to consider such appeals.

In support of such discretionary authority in the commissioner, which it is argued is unreviewable and gives rise to an implied exception in respect of deficiencies arising under the special assessment sections, Government counsel rely on the language employed in section 327 of the revenue acts of 1918 and 1921. Except for a slight change which has no bearing in this consideration, the language of that section is identical in both the acts referred to. Section 327 of the revenue act of 1918 provides in part:

"Sec. 327. That in the following cases the tax *shall be* determined as provided in section 328:

"(a) Where the commissioner is unable to determine the invested capital as provided in section 326;

"(b) In the case of a foreign corporation;

"(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

"(d) Where upon application by the corporation the commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328." (Italics ours.)

Let us examine this section. In the first place the determination under section 328 is mandatory under the conditions enumerated in the subdivisions of section 327. In subdivision (a) the condition is that the commissioner shall be unable to determine the invested capital as provided in section 326. It is not discretionary with him whether he shall be unable so to determine. It specifically makes his inability so to determine the test. If the commissioner confesses his inability in this respect and for that reason determines a deficiency in tax under section 328, and from such determination the taxpayer appeals, can it be reasonably argued that since the commissioner could not no one else may? In our opinion subdivision (a) does not confer such unreviewable discretion on the commissioner nor does it give rise to an implied exception in the statute. Subdivision (b) makes it mandatory that the tax shall be determined under section 328 in the case of a foreign corporation. No discretion is conferred on the commissioner by this subdivision. What we have just said relative to subdivision (a) is equally applicable to subdivision (c), except in so far as "unable to determine" is modified by "satisfac-

torily." This modification, however, supports the view above expressed because it connotes an ability to determine, partially at least, certain values which might, upon careful review, be completely determined.

Subdivision (d) is the principal reliance of Government counsel. Therein the condition is expressed that the commissioner "find" and so declare of record that an abnormality exists. This subdivision presupposes his ability to determine invested capital and the respective values of certain classes of property paid in for stock, in accordance with subdivisions (a) and (c). Thus we face the issue whether the use of the word "find" as here used vests the unreviewable discretion in the commissioner, contended for by Government counsel, and thereby creates an implied exception in the law relative to
21 appeals from deficiencies. If this issue be resolved affirmatively, then it would seem to follow irresistibly that a similar conclusion must be applied to a number of instances in the revenue act of 1924 wherein the commissioner, in pursuance of his official duties, is required to make determinations based upon findings made by him. A recital of some of these instances will disclose that the word "find" does not have the cogent significance argued for it.

In section 204 there is provided the basis for determining gain or loss from the sale or other disposition of property acquired by gift after December 31, 1920. In paragraph (2) of subdivision (a) it is provided that "if the commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the commissioner as of the date or approximate date at which, according to the best information that the commissioner is able to obtain such property was acquired by such doner or last preceding owner." The construction argued for by the Government would deprive the taxpayer of an appeal on the question of the fair market value of such property.

A similar duty is laid by statute on the commissioner in section 205 in determining the basis for inventories. An appeal would not lie from a deficiency predicated upon inventories taken on a basis prescribed by the commissioner, irrespective of the correctness of such basis, if the contention of the Government be sound in the instant appeal.

Another example is found in section 206 (b) with reference to production of evidence satisfactory to the commissioner with respect to a net loss. Such a deficiency was recently before the board in the Appeal of Carroll Chain Company, I. B. T. A. 38, in which appeal the commissioner conceded jurisdiction in the board.

Again, in section 216 (a), relating to the allowance of credits for the purpose of the normal tax, the commissioner is charged with determining to his satisfaction whether more than 50 per cent of the gross income of foreign corporations was derived from sources within the United States.

The authority in the commissioner to find, to fix, to determine, and the like, is found in many instances under prior revenue acts. This has not been held to confer an unreviewable discretionary power. The judgment of the commissioner has been reviewed by the courts in numerous cases of this character. The commissioner is required to determine March 1, 1913, value as a basis of depletion and depreciation. He is charged with a similar duty with reference to the value of legacies and decedents' estates under the estate tax provisions. He determines the value of property included in invested capital and likewise the value of capital stock under the capital stock tax provisions. In all of the instances referred to, as well as in many others of a similar character, the courts have undertaken to review the judgment of the commissioner.

It is clear and phraseology employed in section 327 was not intended as significant to the extent of creating an implied exception to the otherwise clearly expressed intendment of the statute relative to appeals.

22 The second proposition argued by Government counsel in support of the instant motion is that it was the intent of Congress to vest in the commissioner sole authority to fix rates in special assessment cases and compute the taxes thereunder, and that his action under such authority is unreviewable; that this intent on the part of Congress is made clear by the enactment of the so-called "secrecy provision" contained in section 3167 of the Revised Statutes as reenacted by section 1018 of the revenue act of 1924; that a consideration of an appeal involving such computations would necessitate making public the records of the commissioner, upon which such computations are based, in violation of section 3167 of the Revised Statutes referred to.

Section 1018 of the revenue act of 1924 provides, in part:

"SEC. 1018. Sections * * * 3167 * * * of the Revised Statutes, as amended, are reenacted without change as follows:

"'SEC. 3167. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever *not provided by law* to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person *except as provided by law*; and it shall be unlawful for any person to print or publish in any manner whatever *not provided by law* any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income returns; * * *.'" (Italics ours.)

From the reading of the foregoing it is apparent that Congress intended to provide exceptions to the general inhibition contained therein, and that these exceptions were to be those "provided by law." One notable and specific exception is contained in section 257 of the revenue act of 1924, which provides in part:

"SEC. 257. (a) Returns upon which the tax has been determined by the commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President. * * *

"(b) The commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, lists containing the name and the post-office address of each person making an income-tax return in such district, together with the amount of the income tax by such person."

Pursuant to the foregoing, the Secretary of the Treasury, with the approval of the President, on September 27, 1924, promulgated Treasury Decision 3638 providing regulations for giving effect to the statute.

Section 3167 of the Revised Statutes appears in the revenue act of 1918 in the same phraseology as above. On January 12,
23 1920, the commissioner, with the approval of the Secretary, promulgated Treasury Decision 2962, in which it is said:

"There are numerous provisions in the statutes constituting the doing or failure to do certain things, offenses against the United States, and providing for collecting unpaid taxes by suits in courts and for bringing suits to recover taxes and penalties wrongfully collected. These provisions would be of no avail were it held that the returns themselves, or certified copies thereof, provided for in section 822, Revised Statutes, could not be used by the Government as evidence in such litigation or in preparation for same. *Manifestly Congress did not, when it enacted section 3167, Revised Statutes, intend to defeat prosecutions and suits in court for which it has specifically provided.*

"Income returns filed with the department as public records of the department, and public records in the Treasury Department are of right available as evidence in litigation in court unless there is some statute making it unlawful to use them as such. (Citing judicial decisions.) As, therefore, the use of income returns or copies thereof in connection with litigation in court, where the United States Government is interested in the result, *is provided for by law*, such returns or copies may be furnished for use without a violation of the provisions of section 3167, Revised Statutes, as amended." (Italics ours.)

Rules and regulations are there prescribed for giving effect to the foregoing.

On June 30, 1921, the commissioner, with the approval of the Secretary, promulgated Treasury Decision 3188, amending Treasury Decision 2962 and Regulations 45 (1920 edition), article 1091. It is said therein:

"The original income return of an individual, corporation * * * or a copy thereof, may be furnished by the Commissioner of Internal Revenue to a United States attorney for use as evidence before a United States grand jury or in litigation in any court, where the United States is interested in the result, or for use in the preparation for such litigation, or to an attorney connected with the Department of Justice designated to handle such matters * * *. When an income return or copy thereof is thus furnished, it must be limited in use to the purpose for which it is furnished and is under no condition to be made public *except where publicity necessarily results from such use.*" (Italics ours.)

The same provisions are contained in Regulations 62, article 1091, promulgated under the revenue act of 1921.

We call attention to the foregoing to show that it has been a recognized policy of the Government under the law as contained in section 3167 of the Revised Statutes to make public the records of the Treasury Department in litigation specifically provided for by law. The law as contained in the revenue act of 1924 establishes the Board of Tax Appeals and provides that it shall be an independent agency in the executive branch of the Government. An agency for what purpose? Section 900 (e) provides, "The board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312." Having so provided, it would follow by necessary implication that the board is endowed with all the necessary authority to effectuate the purpose for which it was created. But Congress conferred this authority expressly rather than by implication. Subdivision (i) of section 900 of the act provides, in part:

24

"(i) For the efficient administration of the functions vested in the board * * * any member * * * may administer oaths, examine witnesses, and require, by subpœna * * * (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing; (2) the taking of a deposition before any designated individual competent to administer oaths under this act; and (3) the answer in writing under oath to any question of fact submitted * * *."

Section 1025 (a) of the revenue act of 1924 provides:

"If *any* person is summoned under this act to appear, to testify, or to produce books, papers, *or other data*, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate proceedings to compel such attendance, testimony, or production of books, papers, or other data." (Italics ours.)

After conferring the authority and powers above outlined on the board, Congress in the same revenue act which reenacted section 3167 of the Revised Statutes provides in subdivision (h) of section 900 of the revenue act of 1924—

"Notice and opportunity to be heard shall be given to the taxpayer and the Commissioner * * *. Hearings before the board and its divisions shall be open to the public * * *. It shall be the duty of the board and of each division to make a report in writing of its findings of fact and decision in each case, and a copy of its report shall be entered of record and a copy furnished the taxpayer. * * * All reports of the board and its divisions and all evidence received by the board and its divisions * * * shall be public records open to the inspection of the public * * *."

We are of the opinion that Congress intended, and has clearly indicated that the general secrecy provisions of the law should not have the effect of ousting jurisdiction of appeals specifically granted by it to this board. It is apparent that Congress intended to confer on the board the power necessary to effectuate the purposes for which it was created. Indeed it is fundamental that every court or tribunal has inherent power to do all things that are reasonably necessary to the administration of justice within the scope of its jurisdiction. Compelling the production of all evidence pertinent and material to a cause at issue before it is unquestionably one of such powers.

We are of opinion that jurisdiction is conferred on this board to hear and determine appeals arising out of the special assessment provisions heretofore referred to, and that in granting such jurisdiction the provisions of the revenue act of 1924 are clear and unambiguous and not susceptible to the restrictions, limitations, and exceptions contended for by Government counsel. However, since this contention has been so earnestly urged it may not be amiss
25 to aid our interpretation of such intent by reference to the history of the legislation creating the board. The United States Circuit Court of Appeals, Eighth Circuit, in the case of United States v. Ninety Nine Diamonds et al., 139 Fed. 961 at page 966, said:

"The clear words of the statute, their certain meaning, the legal requirement that all the terms of the section which are consistent with each other shall be given effect, *a consideration of the subject of the legislation, of the object which the Congress was seeking to attain, and of the evil which it was endeavoring to remedy* point unerringly to the same result." (Italics ours.)

(Writ of certiorari denied by the Supreme Court, 201 U. S. 645; 50 L. Ed. 903.)

The object which Congress sought to attain, the evil it endeavored to remedy, and the consideration given the subject of the legislation creating this board are succinctly stated in the reports of the House and Senate committees, from which the following extracts are quoted:

"The committee commends the establishment of a board of tax appeals to which a taxpayer may appeal prior to the payment of *an additional assessment of income, excess-profits, war-profits*, or estate taxes." (Italics ours.) (House Report No. 179, p. 7.)

"Under the existing law a taxpayer prior to the payment of his tax may appeal to the commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him. The objections that have been raised to this precedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that such an appeal does not involve a review by an impartial outside body, such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide the appeal acts both as advocate and judge, since he must both protect the interests of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer the action of the bureau is final and the correctness of the decision can never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on his appeal, an expensive and burdensome procedure." (Id. pp. 7 and 8.)

"To meet the objections given above, the committee recommends that there be established a board of tax appeals, * * * to hear *all appeals from the assessment of additional income, war-profits, excess-profits*, and estate tax. * * * Both the Government and the taxpayer will appear before the board and present their cases, and the decision of the board will be final as to the amount of tax to be paid." (Id., p. 8.) (Italics ours.)

"The bill provides for the establishment of a board of tax appeals to which the taxpayer may appeal prior to the pay-
26 ment of *an additional assessment of income, excess-profits*, war-profits, or estate taxes. * * *

"Under the existing law, a taxpayer prior to the payment of his tax may appeal to the commissioner, who has established the Committee on Appeals and Review to determine these appeals for him. * * *

"Under the provision of the proposed bill creating a board of tax appeals the taxpayer may, prior to the payment of the *additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the board of tax appeals* and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal both the Government and the taxpayer will appear before the board to present their cases, with the result that each member of the board will sit solely as judge and not as

both judge and advocate. * * * *This proposal meets all the objections that have been raised as to the existing system* and at the same time provides for a flexible and informal procedure which will permit the board to determine expeditiously the cases brought before it on appeal." Senate Report 398, pp. 8 and 9. (Italics ours.)

We are of opinion that the language employed in the revenue act of 1924 confers on this board jurisdiction of appeals involving deficiencies arising out of the application by the commissioner of the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921 as well as deficiencies arising out of a failure by the commissioner to apply those provisions in proper cases. The motion of the solicitor on behalf of the commissioner is denied.

Exhibit F to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Company, Cincinnati, Ohio, Docket No. 46

APPLICATION FOR SUBPŒNA TO ANSWER INTERROGATORIES

To the UNITED STATES BOARD OF TAX APPEALS:

Application is hereby made for the issuance of a subpœna requiring the Commissioner of Internal Revenue, or some other official or person subordinate to the commissioner, having knowledge of, and/or access to, the records in the commissioner's office, to be designated by the commissioner for that purpose, to answer fully in writing under oath each of the several interrogatories hereto annexed as a part of this application.

The reason why it is desired to have the sworn answers of the commissioner or such designated person to the said interrogatories are:

The taxpayer was in the years 1918 and 1919 engaged in the business of manufacturing and selling machine tools.

One of the grounds of this taxpayer's appeal is that it is entitled to have its excess-profits tax liability for the years 1918 and 1919 computed under the provisions of sections 327 and 328 of the revenue act of 1918, and, in order to sustain the burden of proving the
27 amount of its correct tax liability, the taxpayer must show the rate of excess-profits tax for the years 1918 and 1919 of representative corporations engaged in a trade or business like or similar to that of this taxpayer.

The rate of excess profits tax of such representative corporations is evidence material and relevant for the purpose of proving the rate and amount of this taxpayer's tax.

This taxpayer has been diligent in seeking proof of these material facts from other sources and by other means, to this end having written a great number of letters to corporations in various parts

of the United States which were engaged in the business of manufacturing and selling machine tools. It has lately received letters in some cases and ex parte affidavits in others, in some cases showing only fragments of the requested data, some of which was expressed in percentages of ratios rather than exact amounts; the majority of the corporations written to or called upon declined to give the information requested, or failed to answer the taxpayer's letters.

This taxpayer has only such knowledge of the said facts sought to be proved by answers to the aforesaid interrogatories and only such information as is contained in certain letters and ex parte affidavits received from other taxpayers as above explained, which letters and affidavits this taxpayer hereby offers to introduce as evidence in this case if the commissioner will agree to their admission as proof of the facts therein set forth.

Attempts to prove the said facts by other means, even if successful, would entail great expense and hardship to this taxpayer and cause great annoyance and inconvenience to numerous disinterested persons and unwilling witnesses, besides unnecessarily burdening this board with a multitude of details such as the filing and reading of numerous applications and motions and issuing numerous orders and subpœnas.

All the facts sought to be proved by means of answers to the said interrogatories hereto annexed are within the official knowledge of the Commissioner of Internal Revenue and are not within the knowledge of any other person whomsoever outside the commissioner's office.

Counsel for this taxpayer believes, and, so believing, avers that all the corporations whose names are listed in the said annexed interrogatories filed income and profits-tax returns for the years 1918 and 1919, and that all of said corporations were engaged in the business of manufacturing and selling machine tools in those years.

It is desired to have the annexed interrogatories answered fully in writing by the commissioner or other person designated by him for that purpose, and such answers subscribed and sworn to by the commissioner or such designated person before the board, or a member thereof, or before any person authorized by law to administer oaths in the District of Columbia, and the answers so sworn and subscribed filed with the board within fifteen days from service of the subpœna, or within such other convenient and reasonable time as may be fixed by the board, the said answers to be subscribed, sworn to, and filed in accordance with such requirements as the board may deem fit to prescribe.

28 It is respectfully requested that the case be continued and the commissioner be given time within which to answer said interrogatories.

(Signed) J. R. SHERROD,
922 Southern Building, Washington, D. C.,
Counsel for Taxpayer.

Application dated March 17, 1925.

Interrogatories to be answered in writing under oath by the Commissioner of Internal Revenue or a subordinate of his office designated by him for that purpose

NOTE.—The "data sheet" referred to in the following interrogatories means the comparative statistics data sheet, Treasury Department, Internal Revenue Bureau, Form 7365 of August, 1921, ordinarily used in compiling comparative data for the purpose of determining excess profits tax in special cases under the provisions of section 328 of the revenue act of 1918.

The "data" referred to in the following interrogatories means the data called for and ordinarily shown on the above-described "data sheet."

The "card records" referred to in the following interrogatories means the cards ordinarily used in the special assessment section of the Income Tax Unit showing the above described "data" of particular corporations which are used as comparatives in compiling the above described "data sheet."

No. 1. Please state whether or not the application of Oesterlein Machine Company for special assessment for the years 1918 and 1919 has been considered by the commissioner to the extent of comparing the taxpayer with other corporations.

No. 2. Please state whether or not a "data sheet" was prepared in this case covering the years 1918 and 1919, and, if so, how many "data sheets" were prepared for each year.

No. 3. If one or more of such "data sheets" have been prepared for either 1918 or 1919, please submit as the answer to this interrogatory true copies of each of such "data sheets."

No. 4. Please state the names and addresses of each of the corporations whose "data" are shown on the "data sheets" referred to in the foregoing interrogatories, and state the nature of the business in which each was engaged in the years 1918 and 1919, as shown by the records in the commissioner's office.

No. 5. As the answer to this interrogatory, please submit a true copy of each of the cards, "card records," or similar records, if any, showing the 1918 and 1919 "data" of each of the following corporations:

Oliver Machine Company, Grand Rapids, Indiana.
The J. N. LaPointe Company, New London, Connecticut.
Van Werman Machine Tool Company, Springfield, Massachusetts.
Ohio Machine Tool Company, Kenton, Ohio.
Willard Machine Tool Company, Covington, Kentucky.
Carlton Machine Tool Company, Cincinnati, Ohio.
Hoefer Manufacturing Company, Freeport, Illinois.
29 Gould & Eberhardt, Newark, New Jersey.
Garvin Machinery Company, New York City, New York.
The John Steptoe Company, Cincinnati, Ohio.
J. D. Blount & Company, Everett, Massachusetts.
Sreaves, Slussmann Tool Company, Cincinnati, Ohio.

No. 6. If there are no cards, "card records," or similar records for any one or more of the corporations listed in the preceding interrogatory, please give the following information as shown by records in the commissioner's office separately for the years 1918 and 1919 for each such corporations, such information to be taken from the last return filed by each corporation for the years 1918 and 1919, unless the figures in such last return have been adjusted or revised by the commissioner, in which event give the adjusted or revised figures, and where the information is not so shown the same to be taken from any other records in the commissioner's office upon which the information may appear.

(a) Name and address of the corporation.
(b) Date of organization.
(c) Invested capital.
(d) Statutory intangibles.
(e) Adjustments for inadmissibles.
(f) Interest-bearing indebtedness.
(g) Noninterest-bearing indebtedness to stockholders.
(h) Gross sales.
(i) Other income.
(j) Ordinary and necessary expenses.
(k) Compensation of officers.
(l) Repairs.
(m) Interest.
(n) Taxes.
(o) Bad debts.
(p) Exhaustion, wear, and tear (including obsolescence).
(q) Amortization of war facilities.
(r) Depletion.
(s) Special deductions from income.
(t) Net income.
(u) Net income previous year.
(v) Average net income pre-war period.
(w) Average invested capital pre-war period.

Exhibit G to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Company, Docket No. 46

SUBPŒNA TO ANSWER IN WRITING UNDER OATH CERTAIN QUESTIONS OF FACT

The President of the United States of America to David H. Blair, Commissioner of Internal Revenue, greeting:

You are hereby commanded in accordance with the provisions of section 900 (i) of the revenue act of 1924 to answer in writing

under oath the questions of fact in the schedule annexed hereto
30 and to file your answers to said questions with this board on or
before the 28th day of March, 1925.

By order of the United States Board of Tax Appeals this 21st day
of March, 1925.

J. S. Y. IVINS, *Member.*

A true copy.
Teste:
[SEAL.]

ROBERT C. TRACY,
Secretary U. S. Board of Tax Appeals.

Schedule of questions to be answered in writing under oath

NOTE.—The "data sheet" referred to in the following interroga-
tories means the comparative statistics data sheet, Treasury Depart-
ment, Internal Revenue Bureau, Form 7385 of August, 1921, ordi-
narily used in compiling comparative data for the purpose of deter-
mining excess-profits tax in special cases under the provisions of
section 328 of the revenue act of 1918.

The "data" referred to in the following interrogatories means
the data called for and ordinarily shown on the above-described
"data sheet."

The "card records" referred to in the following interrogatories
means the cards ordinarily used in the special assessment section of
the Income Tax Unit showing the above-described "data" of par-
ticular corporations which are used as comparatives in compiling
the above-described "data sheet."

No. 1. Please state whether or not the application of Oesterlein
Machine Company for special assessment for the years 1918 and
1919 has been considered by the commissioner to the extent of com-
paring the taxpayer with other corporations.

No. 2. Please state whether or not a "data sheet" was prepared in
this case covering the years 1918 and 1919, and, if so, how many
"data sheets" were prepared for each year.

No. 3. If one or more of such "data sheets" have been prepared
for either 1918 or 1919, please submit as the answer to this interroga-
tory true copies of each of such "data sheets."

No. 4. Please state the names and addresses of each of the cor-
porations whose "data" are shown on the "data sheets" referred
to in the foregoing interrogatories, and state the nature of the busi-
ness in which each was engaged in the years 1918 and 1919, as shown
by the records in the commissioner's office.

No. 5. As the answer to this interrogatory, please submit a true
copy of each of the cards, "card records," or similar records, if
any, showing the 1918 and 1919 "data" of each of the following
corporations:

Oliver Machinery Company, Grand Rapids, Indiana.
The J. N. LaPointe Company, New London, Connecticut.
Van Norman Machine Tool Company, Springfield, Massachusetts.
Ohio Machine Tool Company, Kenton, Ohio.
Willard Machine Tool Company, Covington, Kentucky.
Carlton Machine Tool Company, Cincinnati, Ohio.
Hoefer Manufacturing Company, Freeport, Illinois.
Gould & Eberhardt, Newark, New Jersey.
31 Garvin Machinery Company, New York City, New York.
The John Steptoe Company, Cincinnati, Ohio.
J. D. Blount & Company, Everett, Massachusetts.
Greaves, Slussman Tool Company, Cincinnati, Ohio.

No. 6. If there are no cards, "card records," or similar records, for any one or more of the corporations listed in the preceding interrogatory, please give the following information as shown by records in the commissioner's office separately for the years 1918 and 1919 for each such corporation, such information to be taken from the last return filed by each corporation for the years 1918 and 1919, unless the figures in such last return have been adjusted or revised by the commissioner, in which event give the adjusted or revised figures, and where the information is not so shown the same to be taken from any other records in the commissioner's office upon which the information may appear.

(a) Name and address of the corporation.
(b) Date of organization.
(c) Invested capital.
(d) Statutory intangibles.
(e) Adjustments for inadmissibles.
(f) Interest-bearing indebtedness.
(g) Noninterest-bearing indebtedness to stockholders.
(h) Gross sales.
(i) Other income.
(j) Ordinary and necessary expenses.
(k) Compensation of officers.
(l) Repairs.
(m) Interest.
(n) Taxes.
(o) Bad debts.
(p) Exhaustion, wear, and tear (including obsolescence).
(q) Amortization of war facilities.
(r) Depletion.
(s) Special deductions from income.
(t) Net income.
(u) Net income previous year.
(v) Average net income pre-war period.
(w) Average invested capital pre-war period.

Exhibit H to petition

TREASURY DEPARTMENT,
Washington, March 28, 1925.

SOL:R
UNITED STATES BOARD OF TAX APPEALS,
Investment Building, Washington, D. C.

IN RE: APPEAL OF OESTERLEIN MACHINE COMPANY, CINCINNATI, OHIO.
DOCKET NO. 46

SIRS: I have been served with an order issued by the board on March 21, 1925, to which order is attached certain interrogatories, which interrogatories I am directed by said order to answer.

32 I regret that it is necessary to inform you that the proper discharge of the duties of my office will not, in my opinion, admit the furnishing of the information called for in said interrogatories.

The reasons prompting this decision are as follows:

(1) The information called for in said interrogatories is communicated to me as Commissioner of Internal Revenue in the strictest confidence and is privileged.

(2) Answer to the interrogatories will divulge information and data from the records in my office, the publication of which is prohibited by the provisions of section 3167 of the Revised Statutes.

Section 3167, Revised Statutes, reenacted without change as part of section 1018 of the revenue act of 1924, makes it unlawful for any official or employee of the United States to divulge or make known in any manner whatever, not provided by law, the amount or source of income, profits, losses, expenditures, or any part thereof, set forth or disclosed in income returns or to permit any income return or copy thereof, or any book containing any abstract or part thereof to be seen or examined by any person except as provided by law.

Congress further emphasized the safeguard that should be thrown around inspection of tax returns by its enactment of section 257 (a) of the revenue act of 1924, which provides that the returns upon which the tax has been determined by me shall constitute public record, but that they shall be open to inspection only upon order of the President under rules and regulations prescribed by the Secretary and approved by the President. Certain definite exceptions are made by that section—for instance, the Committee on Ways and Means of the House of Representatives, Committee on Finance of the Senate, and certain others that are specifically mentioned.

Section 900 (h) of the revenue act of 1924 provides in part as follows:

"All reports of the board and its divisions and all evidence received by the board and its divisions (including, in cases where

the oral testimony is reduced to writing, the transcript thereof) shall be public records open to the inspection of the public."

Section 900 (h) also provides that—

"Hearings before the board and its divisions shall be open to the public."

In view of the two provisions last quoted, it is apparent that the returns of taxpayers used by me as comparatives in fixing the rate of profits tax to be assessed in the case of the appellant taxpayer, could not be used by your board without making public and a matter of public record the details of the returns so used.

In arriving at this decision I am not unmindful of the provisions of section 900 (i) of the revenue act of 1924. However, it is my opinion there is nothing in this section, when considered in connection with the other provisions of law, which authorizes me to divulge the information sought to be secured by the interrogatories referred to in your order of March 21, 1925. Indeed, I believe
33 I am positively prohibited from divulging information of this character concerning taxpayers other than the taxpayer whose appeal is under consideration.

Respectfully,

(Sgd.) D. H. BLAIR,
Commissioner.

[Copy]

Commissioner.

Exhibit I to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Company, Cincinnati, Ohio. Docket No. 46

MOTION TO PROCEED IN COURT

Whereas on March 16, 1925, the taxpayer in the above-entitled appeal made formal application to the Board of Tax Appeals for a subpœna requiring Commissioner of Internal Revenue David H. Blair to answer in writing under oath certain questions of fact; and

Whereas on March 19, 1925, hearing was had before division No. 1 of the board on the aforesaid application, and it appearing to the board that the facts sought to be proved by the aforesaid answers were material to the issue in this appeal and necessary to a determination of the appeal by the board the taxpayer's application was granted; and

Whereas on March 21, 1925, in accordance with order of the board granting the aforesaid application, the board issued a subpœna directed to Commissioner of Internal Revenue David H. Blair, requiring him to answer in writing under oath certain questions of fact in schedule thereto annexed, under the provisions of

section 900 (i) of the revenue act of 1924, and to file answers to said questions with the board on or before March 28, 1925; and

Whereas the said David H. Blair, Commissioner of Internal Revenue, has refused to obey the subpœna and failing to file answers in writing under oath to said questions of fact as required by said subpœna, and still refuses so to do, but has addressed to the Board of Tax Appeals a communication under date of March 28, 1925, stating his opinion that the proper discharge of his official duties would not admit furnishing the information called for by the subpœna, and setting forth certain alleged reasons in support of his opinion; and

Whereas the aforesaid failure and refusal of said Commissioner Blair to answer and obey the subpœna deprives this taxpayer of of its right under the law to a hearing on the merits of the tax controversy raised in the aforesaid appeal and deprives the taxpayer of its right to evidence material, relevant, and necessary to sustain the taxpayer's contention in said appeal; and

34 Whereas the aforesaid failure and refusal is arbitrary, illegal, and in violation of section 900 of the revenue act of 1924; and

Whereas the board is given power under the provisions of section 1025 (a) of the revenue act of 1924 to compel obedience to subpœna issued by the board by applying to the court for appropriate process;

Now, therefore, the taxpayer, by counsel, moves the Board of Tax Appeals to apply to the Supreme Court of the District of Columbia for appropriate process to compel the said Commissioner Blair to obey subpœna of the board and to make answer in writing under oath to the questions of fact as required by the aforesaid subpœna and to file the same with the board on or before a date to be specified by the board or the court.

(Signed) ROBERT N. MILLER,
(Signed) J. ROBERT SHERROD,
(Signed) EDWARD MCCARTHY,
Counsel for Taxpayer.

MILLER & CHEVALIER,
Of Counsel.

WASHINGTON, D. C., *April 13, 1925.*

Exhibit J to petition

United States Board of Tax Appeals

Appeal of Oesterlein Machine Co. Docket No. 46

ORDER DENYING TAXPAYER'S "MOTION TO PROCEED IN COURT"

Counsel for the taxpayer has filed the annexed motion entitled "Motion to proceed in court."

On March 16, 1925, the taxpayer filed formal application to the board for a subpœna requiring the commissioner to answer in writ-

ing under oath certain questions of fact. On March 19, 1925, hearing was had on the application (J. R. Sherrod, Esq., for the application, Robert A. Littleton, Esq., opposed), and it appearing to the board that the facts sought to be proved by the aforesaid answers were material to the issue and necessary to a determination of the appeal, the taxpayer's application was allowed, and on March 21, 1925, the board issued its subpœna under the provisions of section 900 (i) of the revenue act of 1924, directed to the Commissioner of Internal Revenue, David H. Blair, requiring him to answer in writing under oath certain questions of fact specified in schedule thereto annexed and to file the answers with the board on or before March 28, 1925. The commissioner has declined to file the answers as required by the subpœna and has addressed a communication to the Board of Tax Appeals dated March 28, 1925, stating his opinion that the proper discharge of his official duties would not admit furnishing the information called for by the subpœna, his reasons being, as stated in the communication, (1) that the information was communicated to him as Commissioner of Internal Revenue in strictest confidence and is privileged, and (2) that the answers would divulge information and data from the
35 records of his office, the publication of which is prohibited by the provisions of section 3167, Revised Statutes.

The reasons given by the commissioner for his failure to comply with the subpœna were urged by counsel for the commissioner in support of the commissioner's contention that the board had no jurisdiction in special assessment cases and were carefully considered by the board in arriving at the conclusion that it does have jurisdiction in this class of cases. (Appeal of Oesterlein Machine Company, 1 B. T. A. 159.)

The taxpayer now moves the board to apply to the Supreme Court of the District of Columbia under section 1025 (a) of the revenue act of 1924 for appropriate process to compel the commissioner to obey the board's subpœna and to make answer in writing under oath to the questions of fact specified in the aforesaid subpœna and to file the same with the board on or before a date to be specified by the board or the court.

The taxpayer's motion has been considered ex parte and without a hearing thereon.

Without deciding whether, in any case, section 1025 (a) of the revenue act of 1924 authorizes the board to institute proceedings in court as a party plaintiff for the purpose of compelling obedience to its subpœna, it is sufficient for the present case to say that, in the opinion of the board, no such necessity appears. The purpose of section 1025 (a) is to afford relief primarily to the party at whose instance the subpœna is issued. The subpœna in the present case was issued on the taxpayer's application. The taxpayer is the party in interest and the party primarily aggrieved, and as such would be the logical party plaintiff to apply to the court for appropriate process to secure its rights under the law. The taxpayer complains that its

rights are violated by the commissioner's failure and refusal to comply with the subpœna; that it is deprived of a hearing to which it is entitled; and that it is deprived of evidence material, relevant, and necessary to sustain the contention made in its appeal. If this be true, the rights violated are primarily those of the taxpayer, and we think it is the taxpayer who should seek the aid of the court rather than this board. Therefore

It is hereby ordered that the annexed motion of the taxpayer be denied.

Dated Washington, D. C., April 27, 1925.

(Signed) J. S. Y. IVINS,
Member U. S. Board of Tax Appeals.

In Supreme Court of District of Columbia

Rule to show cause

Filed May 25, 1925

* * * * * * *

Upon consideration of the petition filed in the above-entitled case and the exhibits attached thereto, it is by the court this 25th day of May, 1925,

Ordered that the defendants, David H. Blair, Commissioner of Internal Revenue, and the United States Board of Tax Appeals, and each of them, show cause, if any they have, in this court
36 on the 5th day of June, 1925, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, why an order or decree should not be entered herein requiring the respondent, David H. Blair, Commissioner of Internal Revenue, to forthwith obey the subpœna issued by the respondent, United States Board of Tax Appeals, to the said David H. Blair, Commissioner of Internal Revenue, requiring him to produce before said board the data specified and called for in said subpœna and the schedule attached thereto, and to answer under oath the questions submitted by said board along with said subpœna, calling for information necessary and proper to enable the said board to pass upon and determine the rights of the petitioner in its appeal pending before said board, and otherwise perform the duties imposed upon it by law, provided a copy of the petition herein and of this order be served upon defendants on or before June 1, 1925.

A. A. HOEHLING, *Justice.*

In Supreme Court of District of Columbia

Answer of Defendant David H. Blair, Commissioner of Internal Revenue, to the Rule to Show Cause

Filed June 5, 1925

* * * * * * *

The defendant, David H. Blair, Commissioner of Internal Revenue, reserving unto himself the benefit of all manner of objections

and exceptions to the errors and insufficiencies of the petition filed herein and to the jurisdiction of the court in the premises, for answer to the rule to show cause issued herein, says:

1. He admits that he is the Commissioner of Internal Revenue of the United States and that he is temporarily residing in the District of Columbia.

2. He admits that on August 6, 1923, a tax letter was issued setting forth a revised computation of petitioner's taxes for the years 1918, 1919, and 1920, as set forth in paragraph 15 of the petition filed herein, except that the tax for the year 1920 was therein shown to be $182.45, and not $102.45 as set forth in said paragraph 15.

3. He denies that his failure and refusal to disclose the information as to income-tax returns of certain corporations sought to be elicited by the petitioner is arbitrary, wrongful, and illegal, as alleged in paragraph 29½ of the petition. And he avers that, on the contrary, he is prohibited by section 3167 of the Revised Statutes of the United States as reenacted in section 1317 of the revenue act of 1918, in section 1311 of the revenue act of 1921, and in section 1018 of the revenue act of 1924, and that by subdivision (c) of section 328 of the revenue acts of 1918 and 1921 he is prohibited from making public or disclosing such information except where required by either House of Congress.

4. The defendant, David H. Blair, Commissioner of Internal Revenue, further denies that his failure and refusal to disclose and make public the confidential information sought to be elicited by the petitioner is inconsistent with his action in the case of another and
37 different appeal heard before the Board of Tax Appeals. He avers that in the one case referred to, the Citizens Underwriters' Agency, the sole question was whether the taxpayer was a personal service corporation within the provisions of section 200 and subdivision (e) of section 218 of the revenue act of 1918, and that, in order to determine whether the income of the taxpayer was to be ascribed primarily to the activities of the principal owners or stockholders who were themselves regularly engaged in the active conduct of the affairs of the taxpayer, as provided in the statute, it was necessary to develop not only the sources of income of the taxpayer corporation itself but the various activities of the stockholders. He avers that in the case of personal-service corporations the corporation itself pays no income tax, but the tax is included in the individual returns of the several stockholders and is paid by them as in the case of a partnership. He further avers that the returns introduced were those of the stockholders of the taxpayer; that the stockholders whose returns were introduced in evidence were present and were sworn as witnesses, and voluntarily and without objection or claim to privilege testified as to the contents of their individual returns. And he further avers that in the other case referred to by the petitioner, the Denholm McKay Company, the question was as to the allowance of a deduction growing out of a transaction between two corporations with interlocking directorates, the

stock of each of which corporations was held by practically the same person, and that the introduction of the returns of both corporations was necessary to disclose the exact relationship between two corporations and the payment of rentals from one corporation to the other, and that the officers of the taxpayer were present and made no objection. He is advised and believes, and so believing avers, that what was done in the two cases referred to can not control or affect his compliance with the statutory provision prohibiting his disclosing and making public the confidential information sought to be obtained by the petitioner.

5. He denies that it was and is the duty of the Board of Tax Appeals, and that under the law it was incumbent upon the said board, in order to enable it fully to perform the functions for which it was created, as alleged in paragraph 30 of the petition, to procure the defendant David H. Blair, Commissioner of Internal Revenue, to disclose and make public the income-tax returns of corporations other than the petitioner and thus to violate the express statutory provision prohibiting such disclosure.

6. He admits that the tax determined by him for the year 1918 was computed in part on the basis of facts which have not been disclosed to the Board of Tax Appeals or to the petitioner, and that he has not disclosed to the Board of Tax Appeals or the petitioner the facts upon which he determined that petitioner's income tax for the year 1919 should not be computed under the provisions of section 328 of the revenue act of 1918 as alleged in paragraph 32 of the petition. He avers that he is prohibited by the statutory provisions heretofore cited from making such disclosure, and that his sole purpose in refusing to make such disclosure was to comply with the statutory provisions referred to.

7. He denies, as averred in paragraph 34 of the petition, that the corporations whose income-tax returns the petitioner seeks to
38 have disclosed are representative corporations and are similarly circumstanced as the petitioner with respect to gross income, net income, profits per unit of business transacted and capital employed, and the amount and rate of war profits or excess profits.

8. He denies that the facts sought to be proved by answers to the interrogatories served upon him are not within the knowledge of any other person outside the office of the Commissioner of Internal Revenue as alleged in paragraph 35 of the petition. He avers that the corporations named are in possession of this information, and he is informed and believes, and so believing avers, that the corporations whose income-tax returns it is sought to have disclosed are necessary parties to this proceeding.

9. He admits all of the other allegations of the petition not herein specifically denied.

10. Further answering the rule to show cause, the defendant, David H. Blair, Commissioner of Internal Revenue, is advised by counsel, and therefore avers, that the rule to show cause herein was inadvertently issued in that by said rule plaintiff seeks no inter-

locutory relief or relief pendente lite, but seeks only the final relief prayed in the bill of complaint.

Wherefore, having fully answered the rule to show cause issued herein, the defendant, David H. Blair, Commissioner of Internal Revenue, prays that the rule to show cause be discharged with costs.

DAVID H. BLAIR,
Commissioner of Internal Revenue.

PEYTON GORDON,
United States Attorney.
VERNON E. WEST,
Assistant United States Attorney.
CHAS. T. HENDLER,
Special Attorney, Internal Revenue,
Attorneys for defendant, David H. Blair.

[*Duly sworn to by David H. Blair. Jurat omitted in printing.*]

In Supreme Court of District of Columbia

Motion to dismiss

Filed June 5, 1925

* * * * * * *

Now comes the defendant, David H. Blair, and moves to dismiss the petition filed herein, for the following reasons:

1. The petitioner has a plain, adequate, and complete remedy at law.

39 2. The defendant, David H. Blair, Commissioner of Internal Revenue, is prohibited by section 3167 of the Revised Statutes of the United States, as reenacted in section 1317 of the revenue act of 1918, in section 1311 of the revenue act of 1921, and in section 1018 of the revenue act of 1924, and by subdivision (c) of section 328 of the revenue acts of 1918 and 1921, from making public or disclosing such information except where required by either House of Congress.

3. That the United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in fixing a rate in compliance with the law in special assessment cases.

4. That the United States Board of Tax Appeals has no jurisdiction to review the action of the Commissioner of Internal Revenue in granting or refusing to grant special assessment under the provisions of sections 327 and 328 of the revenue acts of 1918 and 1921, and that therefore the testimony sought to be elicited, if taken, would serve no purpose.

5. That the taxpayers the details of whose income tax returns it is sought to compel the defendant David H. Blair, Commissioner

of Internal Revenue, to disclose and make public would be injuriously affected by such disclosure, and they are necessary parties to this proceeding.

PEYTON GORDON,
United States Attorney,
VERNON E. WEST,
Assistant United States Attorney,
CHAS T. HENDLER,
Special Attorney, Internal Revenue,
Attorneys for the Defendant David H. Blair.

In Supreme Court of District of Columbia

Decree and note of appeal

Filed June 29, 1925

* * * * * * *

This cause coming on to be heard the 19th day of June, 1925, on the petition and rule to show cause, and the answer to said rule, and motion to dismiss filed by the defendant Blair, and after argument and consideration thereof, it is this 29th day of June, 1925,

Ordered and decreed:

1. That the motion to dismiss be, and the same is hereby, denied and overruled.

And the parties hereto having agreed that the answer of the defendant Blair to the rule may be taken and considered as the answer to the petition filed herein, it is further ordered, adjudged, and decreed:

2. That the defendant David H. Blair, Commissioner of Internal Revenue, be, and he is hereby, ordered and commanded to obey forthwith the subpœna of the defendant United States Board of Tax Appeals issued and served upon him on the 21st day of March, 1925, in the matter of the appeal of the Oesterlein Machine Company pending before said board and designated as No. 46 on the
40 docket of said board, and forthwith to submit to and file with said Board of Tax Appeals the answers in writing under oath to the questions of fact specified in said subpœna and schedule thereto annexed.

A. A. HOEHLING, *Justice.*

No objection as to form:
VERNON E. WEST,
Ass't U. S. Atty., Atty. for Defendants.

At the time of signing the above decree the defendant David H. Blair, Commissioner of Internal Revenue, noted an exception thereto and in open court noted an appeal therefrom to the Court of Appeals of the District of Columbia.

A. A. HOEHLING, *Justice.*

In Supreme Court of District of Columbia

Assignments of error

Filed July 10, 1925

* * * * * * *

Now comes the defendant, David H. Blair, Commissioner of Internal Revenue, and assigns as error the following:

1. That the court erred in overruling this defendant's motion to dismiss the bill of complaint.
2. That the court erred in entering the final decree herein granting the relief prayed.
3. That the court erred in not holding that the Board of Tax Appeals is without jurisdiction to review, reverse, and control the determination of the Commissioner of Internal Revenue made in the exercise of the judgment and discretion committed to him by Congress in the provisions of sections 327 and 328 of the revenue act of 1918.
4. That the court erred in not holding that the equity court was without jurisdiction to issue a mandatory injunction to compel the Commissioner of Internal Revenue to violate the provisions of section 3167 of the Revised Statutes.
5. That the court erred in not holding that the taxpayers, the details of whose income-tax returns were sought to be disclosed and made public, are necessary and indispensable parties to this proceeding.

PEYTON GORDON,
United States Attorney,
Attorney for Defendant David H. Blair.

In Supreme Court of District of Columbia

Pracipe for transcript of record

Filed July 10, 1925

* * * * * * *

The clerk will please prepare a transcript of record on appeal to the Court of Appeals of the District of Columbia in the above-entitled cause and include therein the following:

1. Petition or bill of complaint.
2. Rule to show cause.
3. Motion to dismiss bill.

41 4. Answer to rule to show cause.

5. Final decree.
6. Note of appeal.
7. Assignments of error.
8. This designation.

PEYTON GORDON,
United States Attorney,
Attorney for Defendant David H. Blair.

Service of copy of above designation acknowledged this 9th day of July, 1925.

HAMILTON & HAMILTON,
Attorneys for Plaintiff.

[Clerk's certificate to foregoing transcript omitted in printing.]

42 [Minute entry of argument and submission Oct. 11, 1926, omitted in printing.]

43 In the Court of Appeals of the District of Columbia

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE
appellant
vs.
OESTERLEIN MACHINE COMPANY, A CORPORATION
No. 4420

Opinion

Before MARTIN, Chief Justice; ROBB and VAN ORSDEL, Associate Justices.

Mr. Justice Van Orsdel delivered the opinion of the court:

VAN ORSDEL, Associate Justice. This appeal is from a decree of the Supreme Court of the District of Columbia ordering and commanding David H. Blair, Commissioner of Internal Revenue, hereafter for convenience referred to as the commissioner, to obey the subpœna of the defendant, United States Board of Tax Appeals, hereafter referred to as the board, issued and served upon him in the appeal of the appellant company pending before said board. The commissioner was ordered by the decree "forthwith to submit to and file with said Board of Tax Appeals the answers in writing under oath to the questions of fact specified in said subpœna and schedule thereto annexed."

The matter in issue involved a finding by the commissioner that appellant company was deficient in payment of income and profit taxes for the years 1918, 1919, and 1920 in the net sum of $1,126.37. Appeal was accordingly taken to the Board of Tax Appeals created by section 900 of the revenue act of 1924, 43 Stats. 336.

In the course of the proceedings before the board the subpœna in question was issued calling upon the commissioner to answer interrogatories in writing under oath touching the evidence, data, and information on record in his office upon which he based his finding. The subpœna was issued under the provisions of section 900 (i) of the revenue act of 1924.

44 The commissioner answered the subpœna, or order of the board, in part, as follows: "I regret that it is necessary to inform you that the proper discharge of the duties of my office will not, in my opinion, admit the furnishing of the information called

for in said interrogatories. The reasons prompting this decision are as follows: 1, The information called for in said interrogatories is communicated to me as Commissioner of Internal Revenue in the strictest confidence and is privileged; 2, answer to the interrogatories will divulge information and data from the records in my office, the publication of which is prohibited by the provisions of section 3167 of the Revised Statutes. * * * Congress further emphasized the safeguard that should be thrown around inspection of tax returns by its enactment of section 257 (a) of the revenue act of 1924, which provides that the returns upon which the tax has been determined by me shall constitute public records, but that they shall be open to inspection only upon order of the President under rules and regulations prescribed by the Secretary and approved by the President. Certain definite exceptions are made by that section—for instance, the Committee of Ways and Means of the House of Representatives, Committee on Finance of the Senate, and certain others that are specifically mentioned."

In short the commissioner challenges the authority of the board to review his finding on the ground: 1, That the assessment of a tax, or refusal to do so, under the special-assessment provisions of the revenue law, involves the exercise of discretion vested in him by law which is not reviewable; and 2, that such a review would result in the disclosure to the public of records in his office, in violation of section 3167, Revised Statutes, as follows: "If any collector or deputy collector, or any inspector, or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine, etc."

45 Congress did not intend by this statute to close the door to judicial inspection of tax records in the custody of the commissioner. Indeed, the statute itself provides for exceptions when it is otherwise "provided by law." Section 257 (a) of the revenue act furnishes a notable exception: "Returns upon which the tax has been determined by the commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President."

Considering section 3167 of the Revised Statutes, appearing in the revenue act of 1918, the commissioner, with the approval of the Secretary of the Treasury, on January 12, 1920, in Treasury Decision 2962, said: "There are numerous provisions in the statutes constituting the doing or failure to do certain things, offenses against the United States, and providing for collecting unpaid taxes in courts and for bringing suits to recover taxes and penalties wrongfully collected. These provisions would be of no avail were it held that the returns themselves, or certified copies thereof provided for

in section 822, Revised Statutes, could not be used by the Gover ment as evidence in such litigation or in preparation for sam Manifestly Congress did not, when it enacted section 3167, Revis Statutes, intend to defeat prosecutions and suits in court for which has specifically provided.

Income returns filed with the department as public records of th department and public records in the Treasury Department are right available as evidence in litigation in court unless there is son statute making it unlawful to use them as such. * * * As, ther fore, the use of income returns or copies thereof in connection wit litigation in court, where the United States Government is interest in the result, is provided by law, such returns or copies may b furnished for use without a violation of the provisions of sectio 3167, Revised Statutes, as amended."

46 Thus it appears that the commissioner himself, throug the Secretary of the Treasury, has established a department policy respecting the furnishing of records and data in aid o judicial proceedings in the courts, which includes, by the most rea sonable interpretation, the present case. It is difficult to conceive o any judicial proceeding more intimately dependent upon the evi dence, records, and data, on which the findings of the commissione in these tax cases is based, then the proceedings reviewing thos decisions on appeal by the Board of Tax Appeals.

This brings us to the consideration of the authority of the com missioner and an analysis of his jurisdiction in the premises. Th procedure to determine the deficiency in the present case, grow ing out of appellee's income tax for the years 1918, 1919, and 192 is found in Title II of the revenue act of 1924. Section 274 of th act provides: "(a) If in the case of any taxpayer, the commissione determines that there is a deficiency in respect of the tax imposed b this title, the taxpayer, except as provided in subdivision (d), shal be notified of such deficiency by registered mail, but such deficienc shall be assessed only as hereinafter provided. Within 60 day after such notice is mailed the taxpayer may file an appeal wit the Board of Tax Appeals established by section 900; (*b*) If th board determines that there is a deficiency, the amount so determine shall be assessed and shall be paid upon notice and demand fro the collector. No part of the amount determined as a deficienc by the commissioner but disallowed as such by the board shall b assessed."

The term deficiency is defined in section 273 of the act as follows "The amount by which the tax imposed by this title exceeds th amount shown as the tax by the taxpayer upon his return; but th amount so shown on the return shall first be increased by th amounts previously assessed (or collected without assessment) as deficiency, and decreased by the amounts previously abated, credited refunded, or otherwise repaid in respect of such tax." Fro

47 this it will be observed that a deficiency tax is merely the dif ference between the amount of tax imposed and the amou returned and paid by the taxpayer.

Turning to the jurisdiction of the board, section 900 of the revenue act, among other things, provides: "(e) The board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312. (i) For the efficient administration of the functions vested in the board or any division thereof, any member of the board may administer oaths, examine witnesses, and require, by subpœna ordered by the board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence from any place in the United States at any designated place of hearing; (2) the taking of a deposition before any designated individual competent to administer oaths under this act; and (3) the answer in writing under oath to any question of fact submitted. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any witnesses summoned or whose deposition is taken under this subdivision shall be paid the same fees and mileage as are paid witnesses in the courts of the United States."

It is clear, we think, from the foregoing provisions of the act that the board is vested with full reviewing jurisdiction over the findings of the commissioner in cases where a deficiency arises from a determination under the special assessment provisions of the act. The appellate power includes the authority not only to review but to investigate de novo the matters in controversy between the Government and the taxpayer. To this end the board may affirm, set aside, or modify, in such manner and to such extent as it may be advised, the findings of the commissioner.

48 Nor is the broad jurisdiction thus conferred upon the board limited or controlled by any discretionary power vested in the commissioner, or statutory inhibitions as to secrecy. Without stopping to analyze sections 327 and 328 of the revenue acts of 1918 and 1921, we find no duties there imposed upon the commissioner which rise to the dignity of unreviewable discretion. The mandatory and alternative methods there employed for reaching a lawful decision, while calling for the exercise of discretion, are merely the means pointed out for reaching a judicial decision subject to review on appeal, all of which, when appeal is taken, pass to the board, to be in turn disposed of by it according to its best judgment and discretion.

The board is an independent agency of the executive branch of the Government, vested with limited judicial powers to which the taxpayer may appeal before payment of an additional assessment of income, excess-profits, or war-profits taxes. This tribunal, unless clearly restricted by express statutory limitations, will be presumed to possess the power to call to its aid every agency essential to the full and complete investigation of the issues committed to its jurisdiction. Sustaining, as we must, the power of Congress to call this

board into existence and to vest it with the broad jurisdiction conferred by the revenue act, it would be a travesty to hold that the evidence upon which that jurisdiction may be intelligently exercised can be withheld by the subordinate officer of the Government, where decisions the board is specially vested with power to review. The statutes imposing secrecy upon the commissioner are not intended to impede the wheels of justice, or to in any manner interfere with the right accorded the taxpayer to avail himself, to the fullest extent, of the protection afforded h[illegible]n by appeal to the board. The right of appeal, and the authority of the board to subpœna witnesses and enforce the production of records and other data, is in the nature of special legislation and to that extent limits the operation of the general secrecy acts.

49 We are not impressed by the glowing picture drawn in the brief of the solicitor, in behalf of the commissioner, of the possibility of unlimited abuse of this power by the board. It is asserted that there is no limitation to the power of the board to call upon the commissioner for the records of all "the thousands of taxpayers that were available to the Commissioner of Internal Revenue when he made his determination." It must be assumed that the board will not abuse its power; that it will call only for such specific documents and data as will throw light on the case in hand; and only for the records of such corporations or persons as were used by the commissioner for comparative purposes. The power, however, to call for data and records in the possession of the commissioner is vested wholly in the discretion and judgment of the board—the commissioner has no option in the matter. The subpœna in this case quiets this alarm, since the twelve companies are specifically named from whose returns certain specified data is requested. The data is described in the petition for the subpœna as follows: "The 'data sheet' referred to in the following interrogatories means the comparative statistics data sheet, Treasury Department, Internal Revenue Bureau, Form 7365 of August, 1921, ordinarily used in compiling comparative data for the purpose of determining excess-profits tax in special cases under the provisions of section 328 of the revenue act of 1918."

This is sufficiently specific to limit the data called for to the particular records relevant to the case under consideration. The right of appeal here afforded has special reference to the protection of the taxpayer from possible arbitrary, unjust, or mistaken action by the officials of the Revenue Department. To sustain the contention of the commissioner would amount to the practical nullification of the act in so far as it provides for the right of appeal. It would impute to Congress the inconsistency of providing for this im-

50 portant board, imposing upon it broad jurisdiction, and then tying its hands and rendering it impotent. This was not the intention of Congress, and it is not the intention of the law.

The decree is affirmed with costs.

51 In Court of Appeals of District of Columbia

DAVID H. BLAIR, COMMISSIONER OF Internal Revenue, appellant
vs.
OESTERLEIN MACHINE COMPANY, A corporation
No. 4420. January Term, 1927

Decree

Jan. 3, 1927

An appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL.

JANUARY 3, 1927.

52 In Court of Appeals of District of Columbia

Memorandum re motion to stay mandate

January 20th, 1927

Motion to stay mandate pending; application for certiorari filed.

53 In Court of Appeals of District of Columbia

[Title omitted.]

Order granting motion to stay mandate

Jan. 22, 1927

On consideration of the motion to stay the mandate in the above-entitled cause pending application for certiorari to the Supreme Court of the United States, it is ordered by the court that said motion be, and the same is hereby, granted.

54 [Clerk's certificate to foregoing transcript omitted in printing.]

In Supreme Court of the United States

Order allowing certiorari

Filed May 2, 1927

The petition herein for a writ of certiorari to the Court of Appe of the District of Columbia is granted. And it is further order that the duly certified copy of the transcript of the proceedings bel which accompanied the petition shall be treated as though filed response to such writ.

MAY 2, 1927.

○